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## Supreme Court of the United States

OCTOBER TERM, 1946

NO. 1122.

ESTATE OF JOSEF BEN DECKER or JOS. B.  
DECKER, Deceased.

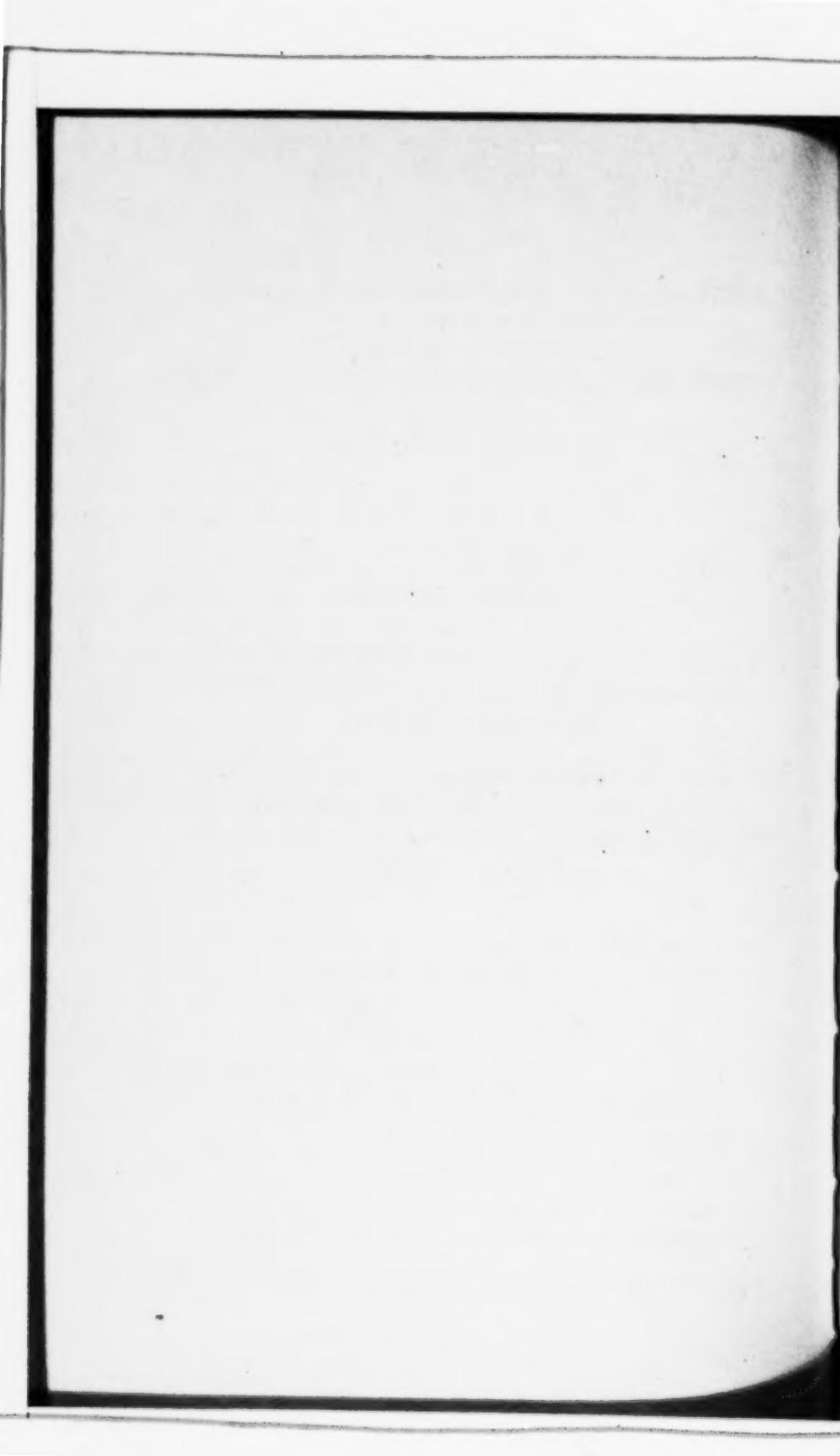
APPEAL OF GERTRUDE M. DECKER, et al., Execu-  
tors, and of GERTRUDE M. DECKER,  
Individually, Petitioners.

BRIEF FOR RESPONDENTS IN OPPOSITION TO  
THE PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF PENNSYLVANIA,  
WESTERN DISTRICT.

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Sunday

- Q. 1000 hours. Left at 10.00 hrs, destination, 27 miles  
from Suez. Went through Suez Canal, or about west  
of Suez Canal, until 10.30 hrs. At 10.30 hrs. 40° 25' N.  
23° 30' E. Then took a bearing on Suez Canal, 20 miles  
S.E. From this bearing, 40° 25' N., 23° 30' E., 10.30 hrs.  
At 10.30 hrs passed 40° 25' N., 23° 30' E., 10.30 hrs.  
Left Suez Canal, 20 miles S.E. from Suez Canal, 10.30 hrs.  
At 10.30 hrs. 40° 25' N., 23° 30' E., 10.30 hrs.  
Left Suez Canal, 20 miles S.E. from Suez Canal, 10.30 hrs.  
At 10.30 hrs. 40° 25' N., 23° 30' E., 10.30 hrs.

# **Supreme Court of the United States**

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**OCTOBER TERM, 1946**

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**BRIEF FOR RESPONDENTS IN OPPOSITION TO  
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WESTERN DISTRICT.**

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## **OPINION BELOW.**

The Opinion of the Supreme Court of Pennsylvania (R. 95) is reported in 355 Pa. 331; 49A 2d 714; and the Opinion denying the motion for reargument (R. 10) is reported in 355 Pa. 476.

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**JURISDICTION.**

Petitioners, in their Petition for Writ of Certiorari (p. 1), and in their Brief in Support of Petition (p. 7), claim that jurisdiction is conferred on this Court by Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (*U. S. C. A., Title 28, Section 344*).

Respondents contend that this case does not fall within Section 237 (b) of the Judicial Code and that the Supreme Court of the United States is without jurisdiction under said section of the Judicial Code, since there is no title, right, privilege or immunity under the Constitution, or any treaty or statute of the United States *personal* to petitioners which has been specially set up or claimed by either party.

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**STATEMENT.**

The following is deemed necessary in order to correct certain inaccuracies and omissions in the Statement of petitioners:

Since reference is frequently made to R. 68 a to 75 a, it is important to note that said pages of the Record contain the facts as found by the trial court, which facts were stipulated by the parties hereto to be the facts in this case (R. 16 a). This Stipulation was entered into in lieu of the testimony taken before the Auditing Judge (R. 16 a).

Claim against the Estate of Josef Ben Decker, Deceased, for outstanding assessments of income and estate taxes was made by the United States Tax Col-

lector before the Auditing Judge of the Orphans' Court of Allegheny County (R. 13 a). In the Statement of Claim for Taxes Due the United States, filed in the Orphans' Court of Allegheny County, Pennsylvania, by the United States Tax Collector, priority of the United States was claimed for the payment of taxes under *Section 3466 of the Revised Statutes\** (*Title 31, U. S. C. A., Section 191*) (R. 15 a). The United States Government did not pursue its claim of priority beyond the Orphans' Court of Allegheny County, Pennsylvania, was not a party to the Appeal to the Supreme Court of Pennsylvania and is not a party to this Petition for Writ of Certiorari.

Under the 1937 Agreement, certificates for the stock sold to Decker by the Kanns were endorsed by Decker and thereafter held by the Kanns as collateral security for the payment of the purchase price with interest (R. 69 a). Decker also executed an order to the company whose stock was involved directing it to pay to the Kanns all dividends which might be declared on said stock until said purchase price has been fully paid with interest. When said purchase price was paid in full, the certificates representing said shares were to be surrendered to the buyer (R. 69 a).

Under the 1941 Agreement the Kanns had negotiated a loan with the Peoples-Pittsburgh Trust Company in order that Decker, the Kanns and others might purchase certain stock (R. 70 a). The loan was to be secured by collateral satisfactory to said bank, which collateral was furnished by the said Messrs. Kann (R. 70 a and 71 a).

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\* Hereinafter designated R. S.

*Statement.*

Pursuant to the 1941 Agreement, Decker delivered to the Kanns, on or about December 19, 1941, certificates for the stock purchased for him, so endorsed by Decker as to be transferable (R. 72 a).

In said 1941 Agreement, Decker contracted to indemnify and save the Kanns harmless from every liability under the loan transaction to the extent of his participation in the total indebtedness, and until he paid his share of the loan, whether directly to the Trust Company or to reimburse the Kanns, he was not entitled to a return of the stock certificates (R. 43 a, 45 a and 46 a).

Decker confirmed the fact that the Kanns were entitled to retain the stock as security under the 1941 Agreement by his letter dated October 31, 1942 (R. 73 a). In said letter Decker acknowledged that the Kanns were still holding said stock; Decker knew that the stock had not been deposited with the Trust Company as collateral for the general loan which had been negotiated in 1941; and he authorized the Kanns to deposit said stock with the voting trustee and to accept from such voting trustee, in place and stead of such stock, voting trust certificates, which the Kanns were to hold in lieu of the stock under the terms of the 1941 Agreement (R. 73 a).

At the time that the stock certificates were delivered by the Kanns to the voting trustee, there were exhibited to the trustee the Agreements of 1937 and 1941, and likewise the letter to the Kanns signed by Decker, the decedent, dated October 31, 1942 (R. 73 a).

The voting trust certificates were not delivered to the Kanns by the voting trustee in lieu of the stock deposited with it until some time after June 21, 1944, be-

cause of a writ of foreign attachment by Triumph Explosives, Inc. against Decker, in which action the voting trustee was summoned as garnishee (R. 74 a).

Petitioners, in their Statement (Petition for Writ of Certiorari, p. 3), state that the ancillary administrator took possession of and endorsed the voting trust certificates and then sold them so that the cash proceeds of sale became the subject matter of the ancillary administration. Petitioners did not state, however, that the Kanns delivered the voting trust certificates to the ancillary administrator pursuant to a written agreement entered into between the ancillary administrator and the Kanns on November 14, 1944. Furthermore, said agreement provided, *inter alia*, that the proceeds of sale of the voting trust certificates, which were to be turned over to the ancillary administrator by the Kanns should be held by the ancillary administrator subject to all the rights and claims which the Kanns had under the 1937 and 1941 Agreements (R. 75 a). The agreement with the ancillary administrator also provided that the administrator should hold the proceeds of sale of the voting trust certificates until the rights of the Kanns as claimants were adjudicated (R. 75 a).

The proceeds of said sale were embraced by the Account before the Orphans' Court of Allegheny County, Pennsylvania, for audit (R. 75 a). The Supreme Court of Pennsylvania, in affirming the said Orphans' Court, held that the Kanns had a perfected secured lien as pledgees of the stock received from Decker under the Agreements both of 1937 and 1941, and that said perfected secured lien was never lost by them (R. 101). Though petitioners state that the Supreme Court of Pennsylvania did not distinguish an imperfect lien from

a perfected one (Petition for Writ of Certiorari, bottom of p. 3), they admit that the Supreme Court of Pennsylvania found that the Kanns *had* a perfected secured lien that gave them a preference over the United States (Petition for Writ of Certiorari, p. 2).

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### SUMMARY OF ARGUMENT.

I. Respondents contend that this case does not come within Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (U.S.C.A., Title 28, Section 344) and that, therefore, the Supreme Court of the United States is without jurisdiction. The title, right, privilege or immunity under the United States statute presented in this case by petitioners is the title, right, privilege or immunity of the United States Government, and not of the petitioners. The priority claimed by the petitioners is not for themselves, but for a third party, the United States Government, and petitioners do not even assert any claim for themselves thereunder. Therefore, the petition should be denied for want of jurisdiction.

II. The Kanns had a perfected secured lien as pledgees.

III. The priority conferred upon debts of the United States under R. S. 3466 was not intended to be superior to the rights of prior perfected secured liens. To hold otherwise would rock the financial structure of the nation by making loans to individuals such a risk that they would no longer be acceptable inasmuch as the pledgee would lose the collateral if the pledgor died be-

fore paying the debt and left an estate insufficient to pay taxes or other debts due the Government.

IV. R. S. 3466 (Title 31, U.S.C.A., Section 191) must be construed with Section 3672 (b) (1) (Title 26, U.S.C.A.). The latter section provides that tax liens in favor of the United States shall not be valid with respect to a security as against any pledgee (among others), if at the time of the pledge, pledgee is without notice or knowledge of the existence of such lien.

V. The lien of estate taxes under Section 827 (Title 26, U. S. C. A.) dates only from the time of decedent's death and does not take priority over existing pledges the liens of which had attached during decedent's lifetime. Since the Kanns' liens attached during Decker's lifetime and existed before the date of his death, the United States is not entitled to priority of payment under Section 827.

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**ARGUMENT.****I.**

**Section 237 (b) of the Judicial Code does not confer jurisdiction upon the Supreme Court of the United States in this case.**

The petitioners, both in their Petition (p. 1) and in their Brief (p. 7), state that jurisdiction is conferred on this Court by Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (U.S.C.A., Title 28, Section 344).

The foregoing section of the Judicial Code provides, *inter alia*, that it shall be competent for the Supreme Court, by certiorari, to review and determine any cause wherein a final judgment has been rendered by the highest court of the State, where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States. In the instant case, the title, right, privilege or immunity was specially set up before the Orphans' Court of Allegheny County, Pennsylvania, by the Federal Government (R. 13 a, 14 a and 15 a); and, as so aptly put by the Supreme Court of Pennsylvania, (R. 95) is being championed by the petitioners. Obviously the executors and Gertrude M. Decker, as an individual, the petitioners, do not represent the United States Government nor do they claim that they do.

However, for the Supreme Court of the United States to have jurisdiction in such a case, the title, right, privilege or immunity must be claimed by the petitioners themselves, and not for a third person under whom they

do not even assert any claim. *Long, et al. v. Converse, et al.*, 91 U. S. 105. This principle is well established and has been enunciated by the Supreme Court of the United States in a long line of cases. This Court has invariably held that if the title set up by appellants is that of a third person, in which they have no interest, the petition must be denied for want of jurisdiction. *Miller v. Lancaster Bank*, 106 U. S. 542; *Giles v. Little*, 134 U. S. 645; *Ludeling v. Chaffe*, 143 U. S. 301; *Texas and Pacific Railway Co. v. Johnson*, 151 U. S. 81; *Conde v. York*, 168 U. S. 642; *Liberty Warehouse Co. v. Burley Tobacco Growers Cooperative Marketing Association*, 276 U. S. 71; 72 L. ed. 473; and *Wilder Tileston v. Abraham S. Ullman*, 318 U. S. 44; 87 L. ed. 603.

In the instant case petitioners have set up a title, right, privilege or immunity under a statute of the United States which is not personal to themselves, but only to the Federal Government, under whom petitioners are not claiming. In view of the foregoing principle of law, as established by the Supreme Court of the United States in the cases cited above, the Petition for Writ of Certiorari should be denied for want of jurisdiction.

## II.

The pledge of stock created perfected secured liens and, therefore, the claims of the United States are not entitled to priority.

Petitioners contend that the liens—if there were any at all—were not perfected liens (Petitioner's Brief, p. 13), for the reason that the voting trust certificates on the date of the death of Decker were in the hands of the voting trustee made out in the name of the decedent and not endorsed by him. This contention is with-

*Argument.*

out substance since the stock certificates which were originally endorsed and pledged by Decker to the Kanns were all turned over by the Kanns to the voting trustee to be exchanged for voting trust certificates pursuant to a letter from Decker authorizing their so doing. This letter (R. 48 a) is so clear and so important that we shall quote it in full.

**"EXHIBIT C."**

Elkton, Maryland,  
October 31st, 1942.

Messrs. G. H. and W. L. Kann,  
4839 Harrison Street,  
Pittsburgh, Penna.

Dear Sirs:

This will authorize you to deposit with the Peoples-Pittsburgh Trust Company, as Voting Trustee under a certain agreement with the stockholders of Triumph Explosives, Inc., 13,166 shares of the capital stock of Triumph Explosives, Inc., 7,166 shares of which are held by you under the terms of agreement dated December 12, 1941 by and between G. H. Kann, W. L. Kann, A. Leo Weil, Jr., I. A. Diamondstone, and myself, and 6,000 shares of which are held by you under the terms of an agreement between G. H. Kann, W. L. Kann and myself dated July 10, 1937; *and to accept from such Voting Trustee in place and stead of such stock, Voting Trust Certificates, which you are to hold in lieu of the stock under the terms of the aforesaid agreements.* (Italics ours)

Very truly yours,

J. B. DECKER."

This was an irrevocable consent which, because of the Kanns' interest, could in no way be affected or impaired by Decker's subsequent death. In accordance with the above quoted letter from Decker to Kanns, the stock was surrendered by the Kanns to the voting trustee only for the purpose of conversion into voting trust certificates, and no alteration whatever in the rights of the parties was thereby contemplated or authorized. The Kanns still retained their security, even while the stock was in the hands of the voting trustee, because of the aforesaid letter from Decker, and further because the 1937 and 1941 Agreements as well as the letter from Decker to the Kanns authorizing the deposit were shown to the said trustee (R. 73 a).

The delay of the voting trustee in delivering the certificates to the Kanns until subsequent to Decker's death when Decker could no longer endorse the certificates could not affect the relationship between the Kanns and Decker nor the respective rights of the parties in the certificates. Moreover, this delay on the part of the voting trustee is explained by the writ of foreign attachment wherein the voting trustee was garnishee (R. 74 a).

Petitioners' allegation (Petitioners' Brief pp. 10 and 14) that if the Kanns had had a perfected lien they would not have had to apply to a court for an ancillary administration to effect a sale of the voting trust certificates is so specious that we question the need of answering it. The inference is that the appointment of the ancillary administrator was necessary to enable the Kanns to sell the voting trust certificates. Such is not a fact. If an ancillary administrator had not been appointed, the Kanns could have refused to have accepted

from the voting trustee the voting trust certificates in Decker's name and they could have insisted that the certificates be issued and delivered to them in their names. They then could have sold the certificates and have paid to the domiciliary administrator the amount received from the sale in excess of the debt due them.

The Kanns did not get delivery of the voting trust certificates until after decedent's death and, presumably, they never saw them until then. When the Kanns deposited the actual securities properly endorsed with the voting trustee they then had a perfected secured lien thereon as pledgees. Therefore, the voting trustee, as agent of the Kanns, had the securities which were collateral for the debts, and it was the voting trustee's duty to eventually give to the Kanns whatever kind of a voting trust certificate was necessary in order to properly protect the Kanns in exchange for their delivery of endorsed securities which they held as pledgees. When the Kanns eventually did receive the unendorsed voting trust certificates, Decker had already died and the Kanns' position as pledgees with perfected secured liens had been already definitely established on the date of Decker's death. The mere fact that some time subsequent to Decker's death, upon the dissolution of the foreign attachment, the voting trustee delivered to the Kanns voting trust certificates in Decker's name and of necessity without his endorsement, does not affect the perfected secured pledgee status of the Kanns as between them and Decker at the time of the latter's death and thereafter.

Petitioners further contend that there were no liens at all, since under the 1937 Agreement (Exhibit "A", R. 36 a to 40 a) the Kanns had an option to repurchase

(Paragraph 9) (R. 38 a) and an obligation to repurchase in case of death (Paragraph 10) (R. 38 a), which option and obligation the Kanns breached.

Clearly, there can be no breach of an option to repurchase. An option in and of itself gives a choice, and the fact that the sellers elected not to exercise the option could in no way be construed as a breach of the Agreement.

As to the obligation to repurchase under Paragraph 10 of the 1937 Agreement (R. 38 a), petitioners fail to mention that before the obligation could be imposed, one of two things must have occurred:—(1) The death of the decedent "while in the employ of the company", or (2) the death of the decedent "within thirty days after the termination of such employment" (R. 38 a).

The evidence does not show the date the decedent ceased to be an employee of Triumph Explosives, Inc. Petitioners' failure to supply any facts as to when decedent's employment ceased and, therefore, as to whether his death occurred while in the employ of the company or within thirty days after the termination of such employment, destroys the very basis for their claiming any default under Paragraph 10. One claiming a breach of contract has the burden of proving the facts constituting the breach. Quoting from the Opinion of the Pennsylvania Supreme Court (R. 99):

"The trouble with appellants' position in this regard is that the burden was upon them to prove that Decker did die within the period thus specified, but they offered no evidence for that purpose."

Petitioners argue that under the 1941 Agreement the Kanns agreed to borrow the money to finance the

*Argument.*

purchase and the borrower required the stock so purchased to be deposited as additional collateral (Petitioners' Brief, p. 16); further, that since the stock was not so deposited the Kanns had no right to retain the stock as collateral on the debt due them from Decker. (Petitioners' Brief, p. 16.)

The fact that the Kanns were entitled to retain the stock as security is not only clear upon a reading of the 1941 Agreement as an entirety, but it is conclusively confirmed by Decker's letter of October 31, 1942 (R. 48 a). This letter not only acknowledged the fact that Decker knew the Kanns were holding said stock as collateral security under the 1941 Agreement and acquiesced therein, but it also authorized the Kanns to deposit said stock with the voting trustee and to accept from such voting trustee, in place and stead of such stock, voting trust certificates, which the Kanns were to hold in lieu of the stock.

In view of the foregoing, the Kanns did not breach the 1937 Agreement, and also had a right to hold as collateral security the stock involved under the 1941 Agreement.

Therefore, the conclusion of the Supreme Court of Pennsylvania (R. 101)

"that the Kanns originally obtained, and never subsequently lost, the rights of pledgees of the stock received from Decker under the Agreements both of 1937 and 1941, and that those rights were continued in the voting trust certificates, the proceeds of the sale of which constitutes the present fund for distribution",

is unquestionably sustained by the facts in this case.

The pledgee of property, being entitled to retain the property until the conditions of the pledge are fulfilled,

certainly has a perfected secured lien on that property. The lien of a pledgee to whom the property has been transferred is as perfect as is the lien of a mortgagee whose mortgage has been recorded.

### III.

**The priority conferred upon debts of the United States under Revised Statutes 3466, Title 31, U.S.C.A. 191 was not intended to be superior to the rights of prior perfected secured lien holders.**

The facts in this case disclose that respondents, the Kanns, had a valid perfected specific lien. The respondents insist that such a lien is not subordinated to, but is, in fact superior to the priority of the Government under Revised Statutes 3466, Title 31 U.S.C.A., Section 191. *United States v. Cutts*, 1 Sumner 133; Fed. Cas. No. 14192; Annotation to *New York v. McClay*, 288 U. S. 290 in 77 L. ed. 754, pp. 757 to 796.

Petitioners' contention is untenable that even though the Kanns have a perfected specific lien, nevertheless they do not have a priority of payment because of R. S. 3466 granting the United States a priority for debts due the United States. Were this contention of petitioners sustained by your Honorable Court, then not only individuals but every bank throughout the United States holding pledged collateral of individuals as security for their loans would lose their collateral security if the pledgor happened to die before repaying the loan and left an estate insufficient to pay the taxes owed the Government. Such a situation would disrupt the whole economic structure of this country whereby individuals

and concerns with good marketable collateral, by the pledging thereof, are now able to obtain loans.

Although we have not been able to find any decision of the United States Supreme Court determining whether the priority of the United States under R. S. 3466 was intended to be superior to the rights of valid perfected specific lien holders, the reason is that in all the cases reviewed by this Court it was found that the lien was not perfected and specific. However, in the recent case of *People of Illinois v. Campbell* decided December, 1946, 328 U.S . . . , 91 L. ed. 272, at page 281, Mr. Justice Reed in his dissenting opinion says:

"As the Court concludes no specific lien attaches to ascertainable property, I content myself with adding, as to the respective priorities of the United States and a lienor with a specific lien on ascertainable property, that in my opinion such a lienor has priority for his lien despite Rev. Stat. Sec. 3466. See *Thelusson v. Smith*, 2 Wheat. (U.S.) 396, 424, 4 L. ed. 271, 278; *Conrad v. Atlantic Ins. Co.*, 1 Pet. (U.S.) 386, 441, 7 L. ed. 189, 213; *U. S. v. Waddill, Holland & Flinn*, 323 (U.S.) 353, 355, 89 L. ed. 294, 299, 65 S. Ct. 304."

It is to be noted that in the majority opinion in the case of *Illinois v. Campbell*, *supra*, the question of whether the priority of the United States is overcome by a fully perfected and specific lien was not decided for the reason that the Illinois lien was held to be not sufficiently specific or perfected to defeat the Government's priority.

In the instant case, the Kanns have a specific lien on ascertainable property.

Congress, in enacting R. S. 3466, could not have intended it to be construed so broadly as to confer a priority upon debts of the United States as against even prior perfected secured liens, or it would not have enacted Section 827. Section 827 (which we shall discuss under the heading V.) creates a lien of estate taxes which attaches only at decedent's death and fixes the lien of the estate tax at the time of decedent's death. Accordingly, if a *debt* of the United States (which an estate tax certainly becomes upon decedent's death) takes priority under R. S. 3466 against even *prior perfected liens*, then there is no need of making a lien of the estate tax, and Section 827 becomes useless legislation.

#### IV.

**Revised Statutes 3466, Title 31 U.S.C.A. Sec. 191 must be construed with Section 3672 (b)**

**(1), Title 26 U.S.C.A.**

Even if this Court were to hold that the priority of the Government under Revised Statutes 3466 is not overcome by a fully perfected and specific lien, still respondents respectfully contend that said section should be construed with Section 3672 Title 26, U.S.C.A.

Section 3672 (b) (1) provides that tax liens in favor of the United States shall not be valid with respect to a security as against any mortgagee, pledgee, or purchaser of such security for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge or purchase such mortgagee, pledgee or purchaser is without notice or knowledge of the existence of such lien.

Though the priority of payment accorded to the United States by Revised Statutes Section 3466 is not technically a "lien", it is analogous and tantamount thereto. *Marshall v. New York*, 254 U. S. 380, 385, 386.

Accordingly, the rights of a pledgee which accrue before the attaching of a Federal tax lien, there being no notice or knowledge thereof, are not affected by the Federal tax lien. *Meyer Estate*, 159 Pa. Sup. Ct. 296, 48 A 2d 210; *Manufacturers Trust Co. v. Sobel*, 26 N. Y. S. 2d 145; *United States v. Record Publishing Co.*, 60 Fed. Supp. 194.

## V.

The lien of estate taxes under Section 827 Title 26 U.S.C.A. dates only from the time of decedent's death and does not take priority over pre-existing pledges the liens of which had attached during decedent's lifetime.

Attention is invited to the fact that the United States claimed priority only under R. S. 3466 (R. 15 a). In addition, the executors, in their Petition before the Orphans' Court of Allegheny Co., Pa., claimed priority for the United States Government only under the same section of the Revised Statutes (R. 63 a). On the basis of these claims, the auditing judge and the lower court *en banc* considered only said Section 3466 of the Revised Statutes. We do not see how petitioners, who are attempting to champion the Government's claim, can resort to a statute which was never relied upon by the Government in its initial claim presented to and decided by the Orphans' Court of Allegheny County, Pennsylvania.

Section 827, Title 26 U.S.C.A., though unimpaired by Section 3672 (b) (1) creates a lien of estate taxes which attaches only at decedent's death, since the gross estate is determined as of that date and the estate tax itself becomes an obligation of the estate at that time. *Detroit Bank v. United States*, 317 U. S. 329. Since Section 827 creates a general lien upon the decedent's gross estate only from the time of decedent's death, certainly prior pledges of property would not be defeated thereby. Otherwise, pledgees would have no security whatsoever in the event that the pledgor died prior to the time the debt was paid and before the pledge was redeemed. Section 827 does not establish such a priority, but on the contrary establishes only a lien upon the gross estate of the decedent. *Bowes v. United States*, 127 N. J. Eq. 132, 138, 11 A 2d 720, 723.

As stated by the Supreme Court of Pennsylvania (R. 111) :

"Indeed it is impossible to believe that the statute could have intended that a bona fide mortgagee or pledgee should be obliged to surrender the mortgaged or pledged property if, though perhaps many years later, the mortgagor or purchaser happens to die leaving an estate insufficient to pay the estate tax; such an interpretation would be to render pledges and mortgages practically worthless as dependable securities."

The Opinion then follows with:

"It is of interest to note that in *United States v. Paul*, 41 F. Supp. 41, affirmed 127 Fed. Rep. 2d 64, which was the case affirmed by the United States Supreme Court sub nomine *Detroit Bank v. United States*, supra, it was held (see the Court's 8th conclusion of law, p. 47) that the lien of the United States for the Federal Estate taxes was inferior and subordinate to mortgages which had been placed by decedent upon his property prior to his death."

## VI.

## Conclusion.

Respondents contend that Section 237 (b) of the Judicial Code does not confer jurisdiction on this Court in the instant case because the title, right, privilege or immunity under the Statute of the United States herein involved is not personal to petitioners, but is that of the Federal Government under whom petitioners do not even claim.

If this Court does not agree with respondents' contention as to jurisdiction, then respondents urge that they have a perfected specific lien, which defeats the priority of the United States under Revised Statutes 3466; that Section 3672 (b) (1), Title 26 U.S.C.A. should be construed with Revised Statutes 3466, and that, therefore, the pledges here involved are protected against the priority of the United States as created by Revised Statutes 3466; and that Section 827, Title 26, U.S.C.A. only establishes an estate tax lien on the gross estate as of the date of decedent's death and creates no priority over pre-existing mortgages or pledges, the liens of which had attached during decedent's lifetime.

It is therefore, respectfully contended that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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**APPENDIX.**

REVISED STATUTES, Section 3466 (Section 191, Title 31, United States Code Annotated) provides:

*"Priority established.* Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

SECTION 3670 (Title 26, United States Code Annotated) provides:

*"Property subject to lien.* If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

\* \* \* \* \*

SECTION 3672 (Title 26, United States Code Annotated) provides:

*"Validity against mortgagees, pledgees, purchasers, and judgment creditors."*

\* \* \* \* \*

(b) (1) *Exception in case of securities.* Even though notice of a lien provided in Section 3670 has been filed in the manner prescribed in subsection (a) of this section, or notice of a lien provided in section 3186 of the Revised Statutes, as amended, has been filed in the manner prescribed in such section or subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser, of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

\* \* \* \* \*

SECTION 827 (Title 26, United States Code Annotated) provides:

*"Lien for tax.*

(a) *Upon gross estate.* Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed.

(b) *Liability of transferees, etc.* If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under section 811 (b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property sold by such spouse, transferee, trustee, surviving tenant, person in possession of property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien provided in section 827 (a) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

(c) *Continuance after discharge of executor.* The provisions of section 825 shall not operate as a release of any part of the gross estate from the lien for any deficiency that may thereafter be determined to be due, unless the title to such part of the gross estate has passed to a bona fide purchaser for value, in which case such part shall not be subject to a lien or to any claim or demand for any such deficiency, but the lien shall attach to the consideration received from such purchaser by the heirs, legatees, devisees, or distributees."

SECTION 237 (b) Judicial Code as amended by the Act of February 13, 1925, (United States Code Annotated Title 28, Section 344) provides:

It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

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